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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

SHEENA N. YARBROUGH,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACT. NO: 5:15-CV-2325
	)	
DECATUR HOUSING AUTHORITY,	)	
	)	
	)	
Defendant	)	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Sheena Yarbrough, by and through her attorney of record, Michael Forton, and moves this Court to grant her motion for summary judgment. As grounds therefore, the Plaintiff states the following in support of said motion:

INTRODUCTION

It has long been established that the Due Process Clause prevents a state from terminating a person's welfare subsidy without due process protection. Goldberg v. Kelly, 397 U.S. 254(1970). In Goldberg, the U. S. Supreme Court set the standards for pre-termination hearings for public assistance, which is a constitutionally protected property interest entitled to procedural due process. The court explained that due process requires that, "a recipient have timely and adequate notice detailing the reasons for the proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." Id. The court further explained that these rights are important "where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." Id.

Since the Court's holding Goldberg, various courts have applied these principals to numerous government benefits, including Section 8 housing voucher benefits. Davis v. Mansfield Metropolitan Housing Authority, 751 F.2d 180 (6th Cir. 1984).

Under the holding in Goldberg, a Section 8 housing tenant is entitled to strong procedural protections when a PHA seeks to withdraw Section 8 housing payments due to the fact that the actions of a PHA are state action. Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165 (2d Cir. 1973).

A failure to comply with Goldberg, such as the one that occurred in this case, represents a violation of 42 U.S.C. § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. Id.

The Plaintiff (hereafter "Ms. Yarbrough") filed a verified complaint against the Decatur Housing Authority (hereafter "DHA") with this court on December 23, 2015 based on Section 1983. The Plaintiff's complaint contends that the Defendant violated her constitutional rights to procedural due process as well as violating the U.S. Department of Housing and Urban Development (hereafter referred to as "HUD") regulations meant to ensure due process when it terminated her benefits.

NARRATIVE STATEMENT OF FACTS

Plaintiff is a participant in the Housing Assistance program pursuant to Section 8 of the U.S. Housing Act of 1937, 42 U.S.C. § 1437f (hereinafter referred to as "the Section 8 program"). Under the Section 8 Voucher Program, low income families are given vouchers to assist with rental payments. The recipient is allowed to use these vouchers at any location approved by the housing authority. The Section 8 program is administered by local public housing authorities, such as DHA, which enter into annual contracts with HUD. Pursuant to these contracts, subsidies compensate landlords for the difference between the rent a tenant can afford and the market rental rate.

As of 2015, Ms. Yarbrough had received voucher benefits from the DHA for approximately nine years. See Exhibit “A.” On October 8th, 2015 Ms. Yarbrough received a notice stating she was being terminated from the program for allowing an unauthorized occupant to live with her, for failing to complete a repayment schedule and for criminal activity. See Exhibit “B.” On October 15th of 2015, she filed a request for an informal hearing.

On November 10, 2015 a hearing was held. The Housing Authority discussed a great deal about both the person they claimed was living with Ms. Yarbrough (my elderly grandfather) and the repayment schedule. They offered numerous documents regarding both of these claims and Ms. Yarbrough was questioned about both of these issues. The majority of the time in the hearing was spent on these two issues which were the recent issues raised by the Housing Authority.[1]

At the hearing the Housing Authority also offered two indictments issued two years earlier (in April of 2013) regarding drug activity. See Exhibit "C."The indictments did not indicate what (if any) evidence was offered at the grand jury hearing. Outside of the language contained on the indictment no one at the hearing explained what Ms. Yarbrough was accused of (or seemed to be aware of what the actual accusations were). No witness was called to explain the accusation or to be questioned beyond being aware the indictments existed.

[1] The two indictments had happened several years in the past and the DHA had previously spoken with Ms. Yarbrough and elected not pursue termination based on them.

Since no specific factual claims were presented regarding Ms. Yarbrough’s proposed guilt, she offered an order from the Circuit Court of Limestone County showing that the claims involved were in the process of being dismissed. See Exhibit “D.” Ms. Yarbrough also testified that she had previously challenged these accusations.

On November 30, 2015 the hearing officer in this case issued a decision finding that Ms. Yarbrough was terminated from the program for criminal activity. See Exhibit “E.” The decision indicated that the hearing officer believed that although indictments were insufficient for a finding of criminal guilt (which requires proof beyond a reasonable doubt) that an indictment was, without other support, proof by a preponderance of the evidence. It did not address either the Plaintiff’s silence or the DHA’s decision not to question her regarding the matter.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary Judgment is proper when there are no genuine issues of material fact in dispute between the parties. Summary judgment in any case is appropriate only when there are no genuine issues of material fact upon which reasonable people could disagree. Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1316 (11th Cir. 2009), cert. denied, 130 S. Ct. 1139 (2010). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

ARGUMENT

It is well recognized that a PHA's discretion to deny or terminate Section 8 assistance to a participant is defined and limited by federal regulations. See 24 C.F.R. §§ 882.210. Termination decisions must be made in accordance with these regulations. *See*, e.g., Ellis v. Ritchie, 803 F.Supp. 1097 (E.D. Va. 1992); Hill v. Richardson, 740 F. Supp. 1393 (S.D. Ind. 1990); Holly v. Housing Authority of New Orleans, 684 F. Supp. 1363 (E.D. La. 1988). Where an administrative decision, purportedly based on a specific regulatory provision, does not comport with those regulatory provision, the decision is "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In this case, the DHA based its termination of Ms. Yarbrough's benefits on Ms. Yarbrough's alleged violation of her family obligations under the Code of Federal Regulations, specifically that she committed "drug-related criminal activity." In the hearing the only evidence offered regarding Yarbrough's alleged drug-related criminal activity was uncorroborated hearsay in the form of two copies of two indictments. The Housing Authority did not make any specific claims about what they believed Ms. Yarbrough had done and they elected not to question her on the matter. To rebut the hearsay evidence Yarbrough produced an order of the court indicating that the charges against her were in the process of being dismissed upon payment of court costs.

Courts in the Eleventh Circuit have a well-developed and recent series of cases regarding the use of hearsay in Section 8 voucher termination hearings. In each of these cases the courts have held that the uncorroborated hearsay evidence offered was insufficient to deprive the voucher holder of their benefits. *See* Basco v. Machin, 514 F.3d 1177 (11th Cir. Fla. 2008) (where the Eleventh Circuit remanded a Section 8 termination when the Housing Authority relied on two police reports - one which didn't state how long alleged guest lived in home and another which was selfcontradictory because the name was different); Lane v. Fort Walton Beach Housing Authority, 518 Fed. Appx. 904 (11th Cir. Fla. 2013) (where the Eleventh Circuit remanded a Section 8 termination when the Housing Authority relied on an address provided to the sex offender registry); Ervin v. Housing Authority of Birmingham, 281 Fed. Appx. 938 (11th Cir. 2008) (where the Eleventh Circuit remanded a Section 8 termination when the evidence offered was a letter from the police, a witness statement which was inconclusive and the lawyers summary of discussions they had with the police); Sanders v. Sellers-Earnest, 768 F. Supp. 2d 1180 (M.D. Fla. 2010) (where a Florida District Court granted a preliminary injunction reinstating a voucher holder's benefits when the Housing Authority had relied on a man's statement in a police report that the property was his residence in contradiction to the voucher holder's statement that they were lovers and that he stated over only occasionally);

Taylor v. Decatur Housing Authority, 2010 U.S. Dist. LEXIS 144770 (N.D. Ala. 2010) (where the Alabama District Court found that the Housing Authority's attempt to shift the burden of persuasion to the voucher holder by producing a hearsay newspaper article regarding an arrest was a violation of due process and reinstated the individual's benefits).

Each of these cases has also acknowledged that a PHA "has the burden of persuasion **and must initially present sufficient evidence to establish a prima facie case**" at an administrative hearing. See Basco v. Machin, 514 F.3d 1177 (11th Cir. 2008). In this case the only evidence offered by the Housing Authority to meet that burden is the indictment. To the extent that the law requires the Defendant to present a prima facie case it is nonsensical for them to assert that part of their case was her silence, her demeanor or her testimony when they elected not to question her on the matter. It is worth noting that in each of the Eleventh Circuit cases cited the voucher holder did testify at their own hearing and are therefore not distinguishable on the basis that the hearing officer could observe the voucher holder's demeanor.

It is unclear in any event how the hearing officer could evaluate or make determinations about the Plaintiff's guilt or innocence since (as the Defendant has repeatedly pointed out) she did not discuss any of the facts regarding the allegations.[2] The Plaintiff's statements on this matter largely regarded the procedural nature of the court case and are undisputed. Such a determination would not only be unreliable but also appears substantially similar to the "sit and

[2] As noted in the Plaintiff's Memorandum, the Plaintiff was asked if she had given the Housing Authority a letter denying the accusations and asked for a hearing and she says, "Yes." (Doc. 20). The Plaintiff went on to refute the only evidence offered by the Housing Authority, the indictment, by demonstrating that the case is in the process of being dismissed which was unopposed.

squirm" test regarding Social Security applicants. *See* Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984) (where the Eleventh Circuit stated that although it was within the providence of an administrative hearing officer to evaluate testimony they many not independently draw their own conclusions about a Social Security applicant's pain simply by observing them without using medical information).

In three of the Eleventh Circuit cases cited – Lane, Basco and Sanders - the courts have focused on the facts that: 1.) The voucher holder was unable to cross-examine the purported witness and 2.) Without proof of any specific violation the Housing Authority has failed to meet its initial burden of persuasion at an administrative hearing.

In this case, there is no indication of who the unknown informant was (unattributed), whether he had any direct proof or was repeating statements from an informant (multi-level) and it does not offer any of the underlying facts only the (conclusory) proposition of fact that the Plaintiff had committed a drug-related offense.[3]

Although hearsay may be admissible in an administrative hearing, there are due process limits on the extent to which an adverse administrative determination may be based on hearsay evidence. *See* Lane v. Fort Walton Beach Housing Authority, 518 Fed. Appx. 904 (11th Cir. 2013).

Even the case cited by the Defendant in this matter, Costa v. Fall River Housing Authority, 903 N.E.2d 1098 (2009), for the proposition that hearsay should be allowed at Section 8 termination hearings, states that "unattributed, multi-level, and conclusory hearsay evidence" should not be

[3] Alabama grand jury proceedings are done in secret according to statute. See Ala. Code 12-16-214. The task of the grand jury is not to determine the guilt a party but to determine whether or not the State has can demonstrate a prima facie case to move forward to a trial. State ex rel. Baxley v. Strawbridge, 296 So. 2d 779 (1974). A grand jury may indict on the hearsay testimony of single witness who is not subject to cross-examination. McLaren v. State, 353 So. 2d 24 (Ala. Crim. App. 1977).

relied upon. It is worth noting that in Costa, the court also did not find that the observation of the voucher holder could be used as sufficient evidence to corroborate the hearsay.

Pursuant to recently issued guidance from the Department of Housing and Urban Development which reviewed current case law on the matter a Public Housing Agency may not terminate a Section 8 recipient based solely on an arrest. See Exhibit "F." Pursuant to HUD guidance the PHA must produce sufficient evidence to satisfy the "preponderance of the evidence." Yarbrough contends that as a matter of law an unsupported grand jury indictment is therefore not sufficient evidence to support the termination of Yarbrough's benefits.

The Code of Federal Regulations section related to the hearing decision (24 CFR 982.555(e)(6)) requires that, "The person who conducts the hearing must issue a written decision, **stating briefly the reasons for the decision**. Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing. A copy of the hearing decision shall be furnished promptly to the family."

Although the hearing officer does state the reasons for his decision at fairly good length he does not mention any indication that the Plaintiff's behavior or demeanor played any part in his decision. In his decision it is clear that the only evidence he reviewed on this matter was the indictment offered by the Defendant. Although his reasoning is not spelled out in great detail it appears that he believes that a criminal conviction requires proof beyond a reasonable doubt that the decision to indict but not prosecute necessarily is proof

In the hearing officer's decision he notes that he reviewed the indictment offered by the DHA. He incorrectly states that another hearing officer had heard a previous case (he was the hearing officer at the previous case). He also incorrectly states that a previous hearing officer's decision had been nullified by a federal court for failing to provide sufficient advance notice of documents used in a prior hearing. Although there has been a prior federal filing involving the Plaintiff and Defendant it was resolved shortly after being filed by the agreement of the parties and involved neither the issue of advanced notice nor any criminal conduct. To the extent that hearing officer appears to have relied upon these two facts he is not only entertaining issues that were not presented to him at the hearing but also issues which neither party could agree are true.

CONCLUSION

In each of the Eleventh Circuit cases to address these issues – Basco, Lane, Ervin, Sanders and Taylor - the courts have focused on the facts that: 1.) That the hearsay evidence raised serious questions about the validity of the underlying facts (mostly due to inability to cross-examine witnesses) that it was offered to prove and 2.) Based on the underlying weakness of the evidence the Housing Authority has failed to meet its burden at the hearing. Since the violations in this case are indistinguishable from these Eleventh Circuit the Plaintiff would request that the Court find that the Plaintiff's due process rights were violated. Wherefore, premises considered, the Plaintiff respectfully requests that this Court enter summary judgment in favor of the Plaintiff, Sheena Yarbrough, and against the Defendant, Housing Authority of the City of Decatur, Alabama, on all claims asserted.

Respectfully Submitted:

/s/ Michael Forton
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing on the Defendant's attorneys by electric filing this March 1, 2017.

/s/ Michael Forton
Michael Forton